No. 15,281

United States Court of Appeals

For the Ninth Circuit

JOHN YANDELL,
Appellant,

vs.

TRANSOCEAN AIR LINES, a Corporation,
Appellee.

BRIEF FOR APPELLEE.

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JURISDICTION.

Appellee agrees with appellant (BA 3) that jurisdiction of this court to review the order of the District Court is sustained by 28 U.S.C., §1291. But "serious jurisdictional questions" were raised below which should not be ignored on appeal. The District Court did not pass upon those questions. (R 14.) It dismissed the action on the ground that it was barred by either limitations or laches. (R 14-16.)

The complaint in the action was filed September 16, 1953, on the civil side of the court. (R 3-7.) It alleged that on July 31, 1952, an air pilot (plaintiff Yandell) employed by Eastern Airways was assaulted and injured by the manager of a mess hall (defendant Sorenson) in the mess hall owned and operated by his

employer (defendant Transocean) on Wake Island. (R 3-6.) For incurred injuries plaintiff Yandell sought general damages of $150,000, exemplary or punitive damages of $100,000, and special damages in unascertained amounts. (R 6-7.)

An answer was filed by defendant Transocean on October 12, 1955. (R 7-12.) Among other things the answer averred the defenses of laches and limitations. (R 12.)

Jury trial was demanded by plaintiff Yandell and the case set for trial by jury. (R 13.) At the trial of the action in October of 1955, plaintiff Yandell waived a jury and on his motion the case was transferred to the admiralty side of the court and the case tried in admiralty before the court. (R 13.) The court reserved ruling on a motion for judgment on the ground that the action was barred by the statute of limitations, and also on a motion to restore the case to the civil docket. (R 13-14.)

As bases for jurisdiction of the District Court appellant invokes and quotes 28 U.S.C., §1333, and 48 U.S.C., §644a. Appellee is of the view that jurisdiction of the District Court may not be sustained under either of the said sections.

Section 1333 of 28 U.S.C. provides generally that "district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled". Since plaintiff's case merely

involved a nonmaritime tort, namely, assault and battery by one person upon another on land, it is very obvious that the case was not one cognizable in admiralty. (*The Sarah,* 21 U.S. (8 Wheat.) 390-391, 5 L.Ed. 644, 645; *United States v. Matson Nav. Co.,* 9 Cir. 1953, 201 F. 2d 610, 613.) Therefore, jurisdiction of the District Court may not be sustained under said section 1333.

The position apparently taken by appellant is that section 644a of 48 U.S.C. contains the fiction that a nonmaritime tort on Wake Island is a maritime tort, and that thereby the admiralty jurisdiction of every United States District Court has been extended, expanded, or implemented to make such nonmaritime torts universally cognizable in admiralty.

Said section 644a is part of the Organic Act of the Territory of Hawaii. By its very terms the section is confined to the jurisdiction of the United States Court *for the District of Hawaii* and to procedure *therein.* The section ends with the provision that "The laws of the United States relating to juries and jury trials shall be available to the trial of such cases before *said* District Court." (Emphasis added.) Unlike the Death on the High Seas Act (46 U.S.C., §761), recently reviewed by this court in *Higa v. Transocean Airlines,* 9 Cir. 1955, 230 F. 2d 780, 783, the words "in admiralty" do not appear in said section 644a. Fairly considered, the conclusion cannot be avoided that the section confers jurisdiction upon the District Court of the United States *in Hawaii* and upon no other District Court, and that civil and criminal jurisdiction

as distinguished from admiralty jurisdiction is conferred.

Therefore, appellee cannot agree with appellant that jurisdiction of the District Court may be sustained under 28 U.S.C., §1333 or 48 U.S.C. §644a.

STATEMENT OF THE CASE.

On the record before the court, any statement of the case would be incomplete and inadequate, for the record of the trial is not included therein. From the Memorandum and Order of the trial court (R 13-16) it appears that an extensive trial occurred at which witnesses were sworn, evidence was introduced, and various motions were made. None of this appears in the record on which the appeal is presented. It is elementary that an appellant must present a record sufficient to affirmatively show the error he asserts. The appellant here has not done so. On the inadequate and incomplete record before the court it is respectfully submitted that the appellant has not shown and cannot show that the trial court abused its discretion in dismissing the action.

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1. THE DISTRICT COURT EXERCISED A SOUND DISCRETION IN DISMISSING THE ACTION, AND THE ORDER APPEALED FROM SHOULD THEREFORE BE AFFIRMED.

Appellant's sole contention is that the case was in admiralty and therefore governed by the doctrine of laches rather than the local statute of limitations, and

that the court erred in holding that it was bound by the local statute of limitations. Appellant is mistaken. The court carefully pointed out:

> "However, it is not necessary to decide the jurisdictional questions which may flow from this Section (48 U.S.C., §644a) because the action must be dismissed *whether tried in admiralty or as a civil action.*" (Emphasis added.)

As appellant must necessarily concede that his action was properly dismissed if it was a civil action (and appellee insists that it was), there is no occasion to pursue that phase of the case.

On the rules applicable to the doctrine of laches in cases in admiralty, it was said by this court in *Wilson v. Northwest Marine Iron Works,* 212 F. 2d 510, at page 511:

> "The Oregon statute relating to actions for personal injuries requires that they be brought within two years. * * * In applying the doctrine of laches courts of admiralty customarily follow the analogy of the state statute of limitations and hold the claim barred unless the libellant shows special circumstances excusing the delay. Westfall Larson & Co. v. Allman-Hubble Tug Boat Co., 9 Cir., 73 F. 2d 200; Redman v. United States, 2 Cir., 176 F. 2d 713. It is further the rule that when the libel discloses that the statute has already run it becomes incumbent on the libelant to plead and prove facts negativing laches or tolling the statute. 'Detriment to the adverse party is presumed from delay for the statutory period unless the contrary is shown.' Redman v. United States, supra, 176 F. 2d at page 715. Such is the rule in this circuit,

also. Westfall Larson & Co. v. Allman-Hubble Tug Boat Co., supra. And to the same effect see Kane v. Union of Soviet Socialist Republics, 3 Cir. 189 F. 2d 303."

None of the cases cited in the brief for appellant sponsors any different rules in cases like the present where it appeared on the face of the complaint that the California statute of limitations had already run, and plaintiff neither by pleading nor proof showed any facts negativing laches or the tolling of the statute. Even on the inadequate and incomplete record before the court it therefore affirmatively appears that the trial court exercised a sound discretion in dismissing the action "whether tried in admiralty or as a civil action". (R. 14.)

CONCLUSION.

The order appealed from is sound in law and sound in fact, and appellee therefore respectfully submits that it should be affirmed.

Dated, Oakland, California,
January 22, 1957.

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